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HAROLD B. WILLEY, C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1954

No. 695

NATIONAL UNION OF MARINE COOKS AND STEWARDS and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, PACIFIC AMERICAN SHIPOWNERS ASSOCIATION, PACIFIC MARITIME ASSOCIATION, ALASKA STEAMSHIP COMPANY, AMERICAN MAIL LINE, LTD., POPE & TALBOT, INC., and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioners, National Union of Marine Cooks and Stewards and International Longshoremen's and Warehousemen's Union, respectfully pray that a writ

of certiorari issue to review orders of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on January 22, 1955.

CITATION TO OPINIONS BELOW.

The order of the Court of Appeals denying the application of petitioner National Union of Marine Cooks and Stewards for a rule to show cause and denying petitioner International Longshoremen's and Warehousemen's Union leave to intervene was not accompanied by any opinion. However, Circuit Court Judge Pope filed a separate opinion which is as yet unreported. It is printed in the appendix to this petition. The decisions and opinions of the National Labor Relations Board dealing with this matter are reported at 90 NLRB 1099, 98 NLRB 582, 100 NLRB 1259, and 110 NLRB No. 254 (CCH Lab. Law Reporter, Paragraph 52,530).

JURISDICTION.

The order of the Court of Appeals was entered on January 22, 1955. The jurisdiction of the Court of Appeals was invoked under Section 10(e) of the Labor Management Relations Act of 1947 (29 USC 160[e]) and the "all writs section" of the Judicial Code (28 USC 1651). The jurisdiction of this Court is invoked under 28 USC 1254(1) and 29 USC 160(e).

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QUESTIONS PRESENTED.

The question here presented is whether the Court of Appeals, having entered a Consent Decree enforcing an order of the National Labor Relations Board, had jurisdiction to police that decree by restraining the Board from holding any election except one which would not deprive the employees covered by the decree of the right to determine by themselves their collective bargaining representative, as contemplated by the decree. Also involved is the question of whether the Board could, consistently with the national policy against racial discrimination direct an election in a unit broader than that contemplated by the decree in the face of an undenied showing that the unions, whose members made up a majority of the employees in the broader unit, had for almost half a century consistently and deliberately discriminated against Negro and other minority groups by refusing such persons admittance to membership, dispatch to jobs, or employment rights—and this in the face of the fact that a substantial number of the employees in the original, smaller unit were Negroes, Orientals and Filipinos.

STATUTES INVOLVED.

This case involves, *inter alia*, the following provisions of the Labor Management Relations Act of 1947, 29 USC § 160(e):

> "The Board shall have the power to petition any circuit court of appeals . . . for the enforcement of such order and for appropriate temporary

relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings . . . Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part any order of the Board . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon a writ of certiorari . . ."

It also involves the following section of the Judicial Code, 28 USC § 1651:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

STATEMENT.

Petitioners are labor organizations and collective bargaining representatives of persons employed in the stewards department of vessels operated by member

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companies of Pacific Maritime Association, an association of West Coast shipowners.

For approximately twenty years petitioner National Union of Marine Cooks and Stewards (hereinafter referred to as NUMCS) (or its predecessor) was the sole collective bargaining agent of such employees. Other unions presently affiliated with the Seafarers International Union of North America (hereinafter referred to as SIU), represented employees in other departments aboard said vessels: the sailors and deck hands were represented by one union; the firemen and other engine room personnel by another. The various licensed officers were represented by still other unions. This "departmentalized" form of collective bargaining was the traditional bargaining pattern in maritime labor relations on the West Coast.

The two SIU unions which represented the sailors and the firemen were "lily-white" unions, having for almost half a century consciously, deliberately and consistently excluded Negroes and other minority groups from membership, from dispatch to jobs, and from employment. On the other hand, almost half of the members of NUMCS were Negroes, Orientals or Filipinos who were dispatched to jobs and tendered employment without the slightest trace or suggestion of discrimination because of their race.[1]

In 1948, after the passage of the Labor Management Relations Act (61 Stat. 136, 29 USC 141, *et seq.*),

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[1]Indeed, NUMCS was the pioneer union on the West Coast in breaking down patterns of discrimination in the maritime industry.

a complaint was issued by the National Labor Relations Board against NUMCS charging that the provisions of its pre-Taft-Hartley contracts relative to hiring practices and procedures in connection with the employment of stewards department personnel violated provisions of the amended statute (*In re National Union of Marine Cooks and Stewards,* 90 NLRB 1099, 1108). Thereafter, the contracts were modified to conform to the new law and in effect received the Board's approval (*ibid.,* at 1100-1101, especially n. 5). However, in 1949 it was charged that the union's hiring hall in Seattle[2] had in fact been managed in such a way as to deprive non-members of the union of the rights guaranteed to them under the Act, and after proceedings had before it, the Board entered an order directing both the union and the employers to take certain specified action to correct the situation, including the withholding of recognition from the union "until the Respondent Union [petitioner NUMCS] has been certified by the Board." (*In re Pacific American Shipowners Association,* 98 NLRB 582, 605.)[3]

The Board filed with the Court below its petition for the enforcement of this order. The employers filed a petition for "Clarification and Specific Instructions" in which it was asserted that "some feasible

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[2]The union maintained such halls from which men were dispatched to employers or jobs in San Francisco, Wilmington, Portland, Seattle, New Orleans and New York.

[3]All parties clearly contemplated that, consistent with the bargaining history, any West Coast "certification" would be sought in a unit embracing stewards department personnel only.

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and practical detailed procedure" of compliance with the Board's order was necessary in order to keep the ships in operation.[4] It was feared that if the Board's order to cease recognizing the union were literally enforced, and if no substitute procedure was established, men could not be obtained to man the stewards departments of the ships. NUMCS filed with the court below an application for a stay of the Board's order supported by an affidavit of its president in which it was asserted that the enforcement of the order without modification would have a disruptive, if not disastrous, effect upon all West Coast shipping.

The Board's response was to ask from the court below a temporary restraining order which would have put into effect immediately (and irrespective of consequences) the literal terms of its order directing the employers to cease recognizing the union. At this juncture, the SIU filed with the court below a petition for permission to be heard, asserting an interest in the proceedings on behalf of its members.

In the interim, and in order to prevent the serious consequences which would have resulted from enforcing the literal Board's order, all parties were endeavoring to work out the "practical" alternative which would guarantee the continued operation of the

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[4]In the affidavit of the president of the Maritime Association submitted in support of the employers' petition, the history of the controversy was reviewed and the problems of dispatch and hiring of men in the event that the union hall was no longer utilized, were detailed. The affidavit urged that a "practical and workable arrangement" be set up for compliance with the Board's order without disrupting the industry.

vessels. The result was the entry of a "Consent Decree" on June 19, 1952, by the terms of which the court below, obviously exercising its equitable powers, created a Central Registration Office to operate under its jurisdiction, through which employees in the stewards department would be dispatched for employment. Referees were appointed to hear and adjust disputes between the parties and an elaborate machinery was set up to take care of labor relations in the unprecedented situation in which the parties found themselves.

The decree provided that its provisions were to be "continued in effect until a union has been duly certified by the National Labor Relations Board as the exclusive representative for collective bargaining purposes of employees *in the stewards department* of the vessels covered . . ."[5]

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[5]Other provisions of the decree manifest a clear intent that the decree apply to stewards department personnel only:

(a) The decree referred to "the employees covered by the December 2, 1948 contract". This contract was a contract between NUMCS and the employers which covered stewards department employees alone.

(b) By its language, the decree refers throughout to "stewards department employees", "stewards department employment" and "stewards department".

(c) By its terms the decree refers to "terms and conditions of employment of cooks and stewards" and contains as exhibits a "Statement of Employment Conditions for Stewards Department Employees . . ." and "Outline of Terms and Conditions of Employment of Cooks and Stewards".

(d) Finally, the decree provides that "upon certification of an exclusive bargaining representative for stewards department personnel . . . the affairs of the Referee shall be wound up . . ."

In sum, the decree and its appendices make it clear that the concern of all the parties, the Board, and the court, was with stewards department personnel alone.

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In the interim, the Board was processing a representation petition filed in June of 1951 by one of the SIU unions seeking certification as the bargaining representative of stewards department employees. Ultimately, after many delays, and in September 1953, the Board directed an election to be held among stewards department personnel alone (*In re Pacific Maritime Association,* 100 NLRB 1259). The election was not conducted until the spring of 1954—one and a half years later.

During the long delay occasioned by these various proceedings, NUMCS began to lose the adherence of many of its members. However, because of the anti-Negro policies of the SIU unions, the employees flocked to petitioner International Longshoremen's and Warehousemen's Union (hereinafter referred to as ILWU), which thereupon entered the field and moved the Board for a place upon the ballot. Despite ILWU'S showing of interest in 1954, the Board denied its motion to appear on the ballot upon the ground that some three years earlier (when the situation was entirely different) it had shown no interest in the proceedings.

The election in the stewards department alone was held. ILWU, not being on the ballot, urged its adherents to vote for neither union. The election results, as certified by the Board on September 20, 1954, showed that of the 2000 ballots cast, 1287 were for neither union.

The Board did not move to vacate, set aside or modify the Consent Decree after this election. On the

contrary, throughout the period of time since that election, as indeed before, the parties including the Board have continued to operate under the decree; to adjust and adjudicate disputes before the referees appointed by the court; to dispatch and hire stewards department employees through the facilities of the Central Registration Office; and generally to function as though the decree were, as indeed it was, still in full force and effect. These operations were, and indeed up to this very moment are, limited to the affairs of the employees in the stewards department alone.

Despite this fact, and without seeking to be relieved of the decree's obligations to conduct an election in the stewards department alone, the Board on December 16, 1954, directed that another election be held, this time, however, not among employees of the stewards department exclusively, but among all unlicensed seagoing personnel as a single unit. That personnel includes, as already indicated, members of two SIU unions—those representing the sailors and the firemen —who have steadily pursued the deliberate and consistent policy of discrimination against Negroes and other minority groups already described. It is also true, and it was alleged in the court below, that irrespective of how the stewards department employees vote, the sailors and the firemen, by the sheer weight of their numbers, can determine the outcome of the election.

In the proceedings before the Board which resulted in the latest direction of election, ILWU intervened on behalf of the employees in the stewards department and was granted a place on the ballot. In those

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proceedings both NUMCS and ILWU made extensive efforts to prove, through witnesses who were ready and prepared to testify and were present in the hearing room for that purpose, and through documentary evidence, that the SIU unions discriminated in the manner already set forth. The offers of proof were rejected, the Board taking the view that it was not prohibited from certifying as an exclusive collective bargaining representative, a union with such discriminatory policies and practices.

In order to prevent the Board from conducting the election under such circumstances, NUMCS filed its petition in the court below for a rule to show cause why the Board should not conduct the election in the stewards department unit only, and ILWU moved to intervene in support of that position.

After hearing argument, the court below, without opinion, declined to issue the rule to show cause or to permit ILWU to intervene. Judge Pope issued a separate opinion in which he held that the court below was without jurisdiction to grant the relief prayed for and in which he suggested that any discrimination which might occur could be taken care of by resort to the unfair labor practices provisions of the statute.[6]

It is to review the orders of the court below denying their motions that petitioners seek this writ.

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[6]The Board had previously taken the position that the remedy was to be found in the "decertification" provisions of the Act.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In refusing to police its decree by issuing a rule to show cause why the National Labor Relations Board should not be required to refrain from conducting an election, unless the determination of the collective bargaining representative for stewards department employees would, in such an election, be based upon the votes of the stewards department employees alone.

2. In holding that in the face of the racial discrimination shown, the National Labor Relations Board could nonetheless proceed with the certification of the offending unions.

REASONS FOR GRANTING THE WRIT.

1. The court below erroneously declined to exercise its jurisdiction to enforce or police its own decree and thereby left petitioners remediless in the face of the Board's unlawful action.

A. Section 10(e) of the Labor Management Relations Act of 1947 (29 USC 160[e]) gives to the Courts of Appeals, upon the filing of a petition for the enforcement of a Board order, "jurisdiction of the proceeding". In the exercise of this jurisdiction the Courts of Appeals have fashioned their decrees as justice required in the particular case. They have not limited themselves, nor has it ever been held that they were required to limit themselves, merely to enforcing, modifying, or setting aside Board orders.

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The Board, by filing its petition requesting the Court of Appeals to review and enforce its order, subjected itself to the equity jurisdiction of that court.

> "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." (*Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 373.)

The Courts of Appeals have consistently followed this view (*N.L.R.B. v. Boss Mfg. Co.*, 107 F.2d 574 [C.A. 7]; *N.L.R.B. v. Prettyman*, 117 F.2d 786 [C.A. 6]; *N.L.R.B. v. Sunshine Mining Co.*, 128 F.2d 188 [C.A. 9]; *N.L.R.B. v. Stackpole Carbon Co.*, 128 F.2d 188 [C.A. 3], cert. den. 308 U.S. 605; *N.L.R.B. v. Kellburn Mfg. Co.*, 149 F.2d 686 [C.A. 2]; *N.L.R.B. v. Flotill Products*, 180 F.2d 441 [C.A. 9]; *N.L.R.B. v. Alside*, 192 F.2d 687 [C.A. 6]; cf. *Brown v. Pacific Telephone & Telegraph Co.*, 218 F.2d 542 [C.A. 9]).

Indeed, in entering the Consent Decree in the case at bar with its provisions for administering hiring procedures, the court below was exercising just such an equitable power.[7]

B. The circumstance that in the case at bar the Court of Appeals actually entered a decree is further

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[7]While Judge Pope found it "unnecessary to consider" whether the court below had jurisdiction to enter such a decree, it is clear under the authorities cited above that as a "court with equity powers" it did have such jurisdiction.

ground for holding that it had jurisdiction to act in the manner requested by petitioners.

> "We have jurisdiction to effectuate our own decree and it is unnecessary in the case at bar to evoke the provisions of the all-writs section." (*N.L.R.B. v. Stackpole Carbon Co.*, 128 F.2d 188, 189 [C.A. 3], cert. den. 308 U.S. 605.)

It requires no citation of authority to support the proposition that all courts have inherent power to police their own decrees. In the case at bar the essence of the petitioners' prayer to the Court of Appeals was that it enforce its own decree by compelling the Board to comply with the provisions of that decree. Petitioners were not seeking to enforce any Board order, they were seeking to enforce a court decree. Clearly, the court below had jurisdiction over the enforcement of its own decree.

C. In addition, the "all writs section" of the Judicial Code (28 USC 1651) permits the issuance of the order here sought since that is the only way "to prevent a grave miscarriage of justice" (*Gulf Research & Development Co. v. Harrison,* 185 F.2d 457, 459 [C.A. 9]), and "to secure justice in the absence of any other remedy" (*Maryland v. Soper,* 270 U.S. 9). This section is particularly applicable where, as here (cf. *Brown v. Pacific Telephone & Telegraph Co.,* 218 F. 2d 542 [C.A. 9]), the interest asserted by petitioners is a public and not a private one[8] (cf. *United States*

[8]In the *Pacific Telephone* case, *supra,* the Labor Board sought, but the District Court denied, injunctive relief pending final disposition of a case before the Board. The Court of Appeals directed

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Alkali Export Association v. United States, 348 U.S. 11).

D. The Board, having consented to a decree which contemplated the holding of an election in a unit limited to stewards department employees alone, bound itself to the enforcement of the decree in that fashion alone and the court below had jurisdiction to restrain the Board from proceeding otherwise.

> "The cause was remanded to the Board for the purpose of setting aside its findings and order . . . the Board in its application for the remand stated that it would take that course. The specified purpose qualified the court's order. It created a condition which the Board was bound to observe. If the Board within a reasonable time failed to set aside its findings and order, we have no doubt that the court could vacate its order of remand . . ." (*Ford Motor Co. v. N.L.R.B.,* 305 U.S. 364, 372.)[9]

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that the relief sought be granted. In answer to an argument that the denial of the temporary injunction was a matter within the sound discretion of the District Court, Judge Pope, concurring, said: "However valid this contention might be were we dealing here with private rights in private litigation, I think that since this injunction is sought for the protection of the public interest and in aid of a policy which Congress itself has made plain, the area for the exercise of the traditional discretion not to grant an injunction is much more limited. As stated with respect to a somewhat comparable situation in Hecht Co. v. Bowles, 321 U.S. 321, 64 S.Ct. 587, 592, 88 L.Ed. 754: 'For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases.' Cf. Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789." (218 F.2d 542, 545.)

[9]In *N.L.R.B. v. Planters Mfg. Co., Inc.,* 106 F.2d 524 (C.A. 4), the court said: "This we understand to be the intent and meaning of the Board's order. Should attempt be made as respondent fears to apply the order otherwise, the action of the Board will be subject to review upon petition properly filed with this Court."

That the Board might have obtained the enforcement of its order without stipulating to the conditions imposed by the consent decree is irrelevant.[10]

> "We do not turn aside to inquire whether some of these restraints . . . could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the Court.
>
> * * * * * * *
>
> "Wisely or unwisely, they submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall." (*United States v. Swift & Co.*, 286 U.S. 106, 116-117, 119.)

The fact that the Board might not have foreseen the effect of the decree to which it consented is no reason for now relieving it of the obligations created by that decree, and certainly does not justify an argument that the Court of Appeals has no jurisdiction to enforce the decree as entered.

> "And it is immaterial that when respondents consented to the entry of this court's decree they did not foresee that this would be its effect. A

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[10]There clearly was a *quid pro quo:* the elimination of the hazards of further litigation as well as the possibility of a serious disruption of shipping. Actually the Board "gave" nothing, for none of the parties ever questioned the fact that the election would be limited to steward department personnel. Indeed, if NUMCS with its large Negro membership and its knowledge of the discriminatory policies of the other unions had any notion that the stewards were to be placed in a unit which could be controlled by the other unions, it would never have consented to the decree.

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party may not voluntarily submit himself to a judgment of a court one day and flout it with impunity the next when its application proves more distasteful than he had anticipated. N.L.R.B. v. American Mfg. Co., 5 Cir., 132 F.2d 740." (*N.L.R.B. v. Retail Clerks International Association,* 203 F.2d 165, 169 [C.A. 9].)

This case obviously presents important questions with relation to the jurisdiction of the court below over the policing of its own decrees and with relation to the administration of the Labor Management Relations Act of 1947 and for that reason should be reviewed by this Court.

2. The court below erroneously declined to require the National Labor Relations Board to adhere to the national policy against racial discrimination.

A. The order of the Board directing an election in a single unit in which admittedly employees other than the stewards would control the vote,[11] is not only

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[11] A Vice-President of the SIU testified in the most recent proceeding before the Board:

"Q. (By Mr. Leonard) Isn't it true, Mr. Malone, that the reason you rejected that possibility of having the stewards vote by themselves, was that you knew that if all the stewards were given an opportunity to vote by themselves, they would not voluntarily vote for MCS-AFL [the SIU affiliate]?

• • • • • • •

A. We decided on this one as a better angle.

Q. When you say you decided that as a better angle, let's be frank. You decided on it as a better angle because you figured that the votes of the Sailors and Firemen would so swamp the Stewards that it wouldn't matter how the Stewards voted; isn't that true?

• • • • • • •

Q. (By Mr. Leonard) Wasn't that your consideration?

• • • • • • •

A. Why, certainly."

contrary to the long years of bargaining history on the Pacific Coast and violative of the intent and letter of the consent decree, but presents a serious and present threat to the Negro stewards represented by petitioners. The arguments respecting the jurisdiction of the Court of Appeals and the propriety (particularly in view of the Consent Decree) of its granting the relief sought below, are not made in a vacuum. On the contrary, they are presented in the context of a record which demonstrates without any question whatsoever[12] that the majority of the employees in the newly created over-all unit belonged to unions which had for decades practiced the most virulent form of discrimination against Negroes and other non-Caucasians and which further showed that a substantial number of the stewards involved are Negroes, Filipinos and Chinese.

Thus, what is really at issue here is whether or not this Court will permit the Board to clothe "with powers comparable to those possessed by a legislative body" (*Steele v. Louisville & Nashville RR. Co.*, 323 U.S. 192, 202), unions which avowedly flaunt the national policy on this most important question. That certification results in "a tremendous increase in the power of the representative of the group" (*American Communications Association v. Douds*, 339 U.S. 382,

[12]During the course of the last proceeding before the Board, counsel for the SIU stated that he was "willing that the Board assume" that there are presently no Negroes employed in the deck and engine room departments on ships operated by the employers here involved. Furthermore, no contest was made either before the Board or before the Court of Appeals, of the truth of the facts offered to be proved by petitioners.

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401) as a result of governmental intervention on its behalf, cannot be doubted (*Tunstall v. Brotherhood of Locomotive Firemen and Engineers,* 323 U.S. 210; *Wallace Corporation v. N.L.R.B.,* 323 U.S. 248; *Railway Mail Association v. Corsi,* 326 U.S. 88). It can hardly be denied that it would be contrary to public policy to grant such a status to unions which deliberately practice racial discrimination.

B. That the discrimination charged existed and still exists, cannot be denied; nor was it denied at any stage of the proceedings below. Petitioners here tendered evidence to the Board, both in the form of live witnesses present in the hearing room ready to testify to the facts and in the form of documentary evidence issued over the official imprimatur of the offending unions, that those unions for the last twenty years (1) have denied membership solely because of their race to Negroes otherwise qualified for membership; (2) have denied Negroes otherwise fully qualified for employment, the right to register for, and to be dispatched to jobs in, the deck and engine room departments of the vessels operated by the employers here involved; and (3) have been the sole source through which such jobs could be obtained. The petitioners further offered to prove that those unions had pursued a deliberate, studied and systematic policy of excluding Negro seamen otherwise qualified from employment in the deck and engine room departments, and that by virtue of the fact that those unions were the sole source of such employment, a total exclusion of Negro seamen in those departments

had resulted. Petitioners further offered to prove that this policy of total exclusion was in effect at the time those unions filed their petition seeking certification by the Board as the sole collective bargaining representative, and continued up to and through the time of the hearing.

In the face of a "declaration" made by the attorney for those unions after petitioners had commenced making this record, that they would thenceforth follow a policy of equality in representing all *employees* in the unit[13] if they were certified, petitioners offered to prove that the "declaration" was false and that the discriminatory policies continued even after it had been made.[14]

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[13]The promise to treat all "employees" in the unit with equality in the future is no solution to the problem here presented. It does not undo the two decades of discrimination which have made it impossible for Negroes and other non-Caucasians to become "employees". Collective bargaining contracts which give preference of employment based upon "seniority" are not violative of any law and do not constitute an unfair labor practice. Since, as a result of more than twenty years of illegal discrimination, qualified Negro seamen have been deprived of the opportunity to obtain "seniority", they are not and cannot become "employees". Thus the hollowness of the declaration, even if it were true, is revealed.

[14]As revealed by the record before the Board at the last proceedings before it, the offers of proof showed in detail that:

1. At the time of the filing of the last representation petition as well as throughout the period of the hearing and for at least 20 years prior thereto, no Negro seaman had been or was being employed in the deck and engine departments of ships operated by the employers.

2. Such exclusion of Negroes from such employment was the direct and proximate result of, and was caused by, the refusal of the SIU unions to dispatch for employment through their hiring halls Negroes otherwise qualified for employment during the entire period in question.

3. Such refusal on the part of those unions to dispatch Negroes to employment effectively precluded Negroes from obtaining em-

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C. In commenting on this aspect of the case, Judge Pope observed that ". . . the last chapter on this question has not yet been written". Although the last chapter may not be written for a long time to come, there is here an intermediate chapter at least which calls for the authorship of this Court. The right to employment free from discrimination is hardly less significant than the right to desegregated education. (Cf. *Brown v. Board of Education,* 347 U.S. 483; *Bolling v. Sharpe,* 347 U.S. 497.) In the face of this record, there cannot be silence on this question.

The argument advanced below that the Board was not authorized by Congress to act as a Fair Employment Practices Committee and to put Negroes into jobs from which they had been improperly excluded, misconceives the nature of these proceedings. If the SIU unions had carried out their policies of exclusion

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ployment, since during the entire period in question, those unions had, under collective bargaining agreements with the employers, been the sole and exclusive source of employees for jobs in the deck and engine departments.

4. At the time of hearing, those unions were parties to contractual relations with the employers under which preference of employment through the exclusive hiring halls conducted by those unions was given to seamen with previous experience in the deck and engine departments of ships operated by the employers.

5. Those unions had, during the entire period in question, an official policy of refusing membership or job opportunities in their organization to Negroes otherwise qualified for membership, solely because of their race.

6. The foregoing total exclusion of Negroes otherwise qualified from employment in the deck and engine departments and from membership in those unions continued and was in effect even after they had stated that they would represent all employees in the unit without discrimination; that is, that the declaration of policy was false and that the avowed intention not to discriminate was in practice wholly disregarded and affirmatively violated.

without seeking to clothe those policies with the governmental sanction that follows a Board certification, a different situation would have been presented. But the unions were not content to let matters rest there. They sought a privilege of the highest order from the Board. The court below clearly should have required of the Board that it condition its grant of that privilege upon the unions bringing themselves into compliance with the national policy against discrimination; or at the very least, that it implement the national policy by limiting the election to the stewards' department unit—the only unit free from the taint of discrimination.

D. The principles upon which petitioners rely have long since been stated with clarity by this Court.

> ". . . the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." (*Steele v. Louisville & Nashville RR. Co.*, 323 U.S. 192, 203.)[15]
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> "The Federal Act [the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 USC §§151, *et seq.*] thus prohibits bargaining agents it authorizes from using their positions and power to destroy colored workers' jobs in order to bestow them upon white workers *and the courts can protect those threatened by such an unlawful use of power granted by a federal act.*" (*Broth-*

[15]This Court said in the same case that the right to be free from discrimination "is of judicial cognizance" and would be "sacrificed or obliterated" if it were without judicial remedy (*ibid.*, at 207).

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erhood of Railroad Trainmen v. Howard, 343 U.S. 768, 744.)

The foregoing principles, as limitations upon the authority of bargaining representatives under the Railway Labor Act, have been recognized by this Court as equally applicable to such representatives under the National Labor Relations Act. (*Ford Motor Co. v. Huffman,* 345 U.S. 333, 337.) Indeed, it would be passing strange if the public policy against racial discrimination (cf. *Brown v. Board of Education,* 347 U.S. 483, and *Bolling v. Sharpe,* 347 U.S. 497) were held applicable only to the Railway Labor Act and not to the Labor Relations Act.

To determine the question implicit in any such suggestion the writ here sought should issue.

E. The suggestion that there is here available an administrative remedy not to be found in the railroad cases will not bear analysis. Obviously any procedure by way of "decertification" will be long, protracted and expensive. The Negro and other non-Caucasian workers, victims of the discrimination, will suffer the irremedial harm of loss of employment, job opportunities and seniority status while the administrative processes and subsequent judicial review proceed.

But more than that. The decertification of the offending union does not in any shape or form make up to the discriminated employees for the losses they have suffered. The union merely loses its status. This is no remedy for the employees. All it means is that

all employees, white and Negro alike, are left without a collective bargaining representative.

Nor is there validity to the suggestion that an employee who is the object of discrimination has a remedy under the unfair labor practices provisions of the National Labor Relations Act. Those provisions speak expressly and exclusively in terms of discrimination "to encourage or discourage membership in any labor organization". (29 USC 158.) They do not on their face speak in terms of racial discrimination; nor is there anything in either their history or judicial construction that lends support to the proposition that they may be utilized to remedy the evils presented by this record. Indeed, as we have already seen, a collective bargaining contract granting preference of employment upon the sole basis of "seniority" or "experience" would effectively discriminate against non-Caucasians, and not ostensibly by virtue of their race or even lack of union membership. However, the discrimination would be effected because the studied and systematic policies of the unions here seeking a privileged status from the Board, have made it impossible for such persons to become employees and thus to acquire seniority or experience.[16]

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[16]Neither of the cases cited by Judge Pope suggests a contrary conclusion. *N.L.R.B. v. F. H. McGraw & Co.*, 206 F.2d 635 (C.A. 6), involved hiring arrangements in which the discrimination was not based upon a "neutral" factor like "seniority", but admittedly upon "preference to union members" (206 F.2d at 641). See the provisions of the collective bargaining contract summarized in the opinion (206 F.2d at 637): "The company . . . agreed to employ

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Thus this case squarely presents the question of whether consistently with the national policy against racial discrimination the Board may bestow the semi-governmental status of a certified collective bargaining representative upon a union which admittedly has pursued and does now pursue a systematic, studied and deliberate plan to exclude Negroes and other non-Caucasians from membership, from jobs and from job opportunities. Or, more narrowly stated, the question is whether a Court of Appeals is powerless in policing its decree to do anything about this situation.

This Court should issue the writ of certiorari in this case, not only to exercise its supervisory authority over the Court of Appeals (cf. *Hurd v. Hodge,* 334 U.S. 24, 34-35) in connection with the policing by the latter of its own decrees, but also to resolve the important question of the relationship between the enforcement of the Labor Relation Act on the one hand and the public policy against discrimination on the other.

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only members of the union in good standing . . .'' Similarly, in *Radio Officers v. N.L.R.B.,* 347 U.S. 17, the discrimination held unlawful was ''aimed at encouraging employees to join, retain membership in, or stay in good standing in a union . . .'' (347 U.S. at 43). It was nowhere suggested that a preference of employment clause based upon ''seniority'', for example, would be bad.

CONCLUSION.

For the foregoing reasons, it is prayed that the writ of certiorari issue.

Dated, San Francisco, California,
April 1, 1955.

Respectfully submitted,
NORMAN LEONARD,
Attorney for Petitioners.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

(Appendix Follows.)

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Appendix

United States Court of Appeals
Ninth Circuit

National Labor Relations Board, Petitioner, vs. Pacific American Shipowners Association, Pacific Maritime Association, Alaska Steamship Company, American Mail Line, Ltd., Pope & Talbot, Inc., and National Union of Marine Cooks & Stewards, Respondents.	No. 13,386 Jan. 22, 1955.

Separate Opinion of Pope, Circuit Judge.

In concurring in the making of the foregoing order I consider it appropriate to set forth as briefly as possible my reasons for such action. On December 16, 1954, the National Labor Relations Board, after a hearing at which all interested parties were represented, and acting upon a representation petition asking for certification of a bargaining representative of all unlicensed seagoing personnel on ships of the companies which are members of Pacific Maritime Association (here called PMA), determined that all unlicensed seagoing employees on vessels operated by members of PMA constituted a unit appropriate for

the purposes of collective bargaining within the meaning of §9b of the National Labor Relations Act. In doing so, the Board rejected the contention of International Longshoremen's and Warehousemen's Union (ILWU) and of National Union of Marine Cooks and Stewards (NUMCS) that certification should be made of a bargaining representative of steward personnel only, with the further contention that if the Board found a wider unit appropriate, the stewards be permitted to vote separately concerning representation.

Pursuant to the Board's determination and direction an election was scheduled to be held beginning January 17, 1955, at which provision would be made for all such unlicensed personnel on such vessels to indicate their choice between Seafarers International Union, Pacific District, (SFU), on the one hand, and ILWU, on the other. Seafarers International Union, Pacific District, is a convenient name to indicate a group comprising Marine Firemen's Union, Sailors Union of the Pacific, and Marine Cooks and Stewards, A.F.L.

This application was made and entitled in the above cause on January 11, 1955. It is made on behalf of National Union of Marine Cooks and Stewards, a respondent in the enforcement proceedings hereafter referred to, and it seeks an order of this court to the effect that the Board shall conduct no election for the purpose of certifying an exclusive collective bargaining representative of employees in the stewards department of such vessels unless in such elec-

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tion the determination of the collective bargaining representative for the stewards department employees, would be based upon the vote of those employees alone.

It is noted that by this application it is sought to have this court require the Board to determine as the appropriate bargaining unit a group which the Board has heretofore rejected as the appropriate unit.

The Supreme Court has repeatedly announced that §9 of the Act vests power in the Board, not in the court, to select the method of determining what unit employees desire as a bargaining agent. Labor Board v. Falk Corp., 308 U.S. 453, 458.[1] §9b of the Act vests in the Board the exclusive power to determine the appropriate unit for bargaining purposes and its exercise of this power is not subject to court review. A. F. of L. v. Labor Board, 308 U.S. 401.

The applicant union here without questioning the general application of these authorities, asserts that this particular case is different by reason of the provisions of a certain consent decree entered in the above entitled matter on July 9, 1952. That decree was entered in a proceeding initiated in this court by petition of the Board for the enforcement of its order based on findings that the respondents in that proceeding had engaged in certain unfair labor practices. The decree of this court enforced the Board's order by enjoining PMA from recognizing NUMCS as exclusive representative of the stewards department em-

[1]See also Labor Board v. P. Lorillard Co., 314 U.S. 512; Labor Board v. Int. Brotherhood, 308 U.S. 413.

ployees upon said vessels "unless and until said organization shall have been certified by the Board." The consent decree also contained additional provisions apparently intended to provide the mechanics for accomplishing compliance with the foregoing provisions of the decree. It recited that these additional provisions were designed to remove "impairments to the conduct of a free and impartial election that may be ordered" as contemplated in the injunctive portion of the decree.

It was indicated at the argument upon the present application that these additional portions of the decree were inserted by consent of all parties upon the representation to the court that if this or some similar mechanics were not provided the respondent NUMCS or its members would picket the waterfront and that all shipping operated by the respondent employers would come to a halt further making difficult or impossible the holding of election to permit the certification by the board contemplated by the decree. These additional provisions thus inserted in the consent decree provided with considerable detail for a non-discriminatory hiring system relating to the employment of personnel in the stewards department. Paragraph 6 of the decree then recited: "The outline of terms and conditions of employment of cooks and stewards attached hereto as Exhibit H shall be immediately adopted, put into effect, and continued in effect, until a union has been duly certified by the National Labor Relations Board as the exclusive representative for collective bargaining purposes of employees in the

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Stewards Department of vessels covered thereby". The context of the whole decree discloses that these most unusual additional provisions relating to the terms and conditions of employment were intended to be but temporary and to serve until such time as the Board could conduct and complete an election for the purpose of certification.

Although it is noted that the paragraph last quoted, instead of reciting "until an election can be held", states: "until a union has been duly certified", etc., yet the succeeding paragraph of the decree refers to such hiring procedures as having been approved "so as to accomplish the objective of removing any impairments to the conduct of a free and impartial election".

As disclosed by the application, the election contemplated was held between February and May, 1954, and the majority of the employees voted against representation by any union. The applicant union now asserts that the provisions of paragraph 6 quoted above are still in effect since no union has been duly certified as yet. Its argument further is that the language of that paragraph and of other paragraphs discloses that it was contemplated and in fact agreed by the board in consenting to the decree that any election should be one among stewards department employees only. The applicant union therefore says that this court should make the order now requested for the purpose of requiring the Board to observe the consent decree and says: "For the Board now to deny the very self determination which it was the purpose of the decree to grant is indeed for it to turn

matters upside down, and to frustrate and violate this court's decree."

I think it is unnecessary now to consider whether this court ever had any jurisdiction to insert in its decree, whether by consent or otherwise, any provision for administering hiring procedures on the waterfronts.[2] I assume that though the provisions inserted in the decree if intended to serve temporarily during the period of transition necessary to enable the Board to initiate its certification processes, may have been appropriate, yet it cannot be said that the Board could, beyond such interim period, validly relinquish or qualify its statutory powers and duties under §9 of the Act.

Congress alone may limit or qualify the exclusive power and discretion granted to the Board to determine the unit appropriate for the purpose of collective bargaining. We cannot construe the consent decree to have the continuing force and effect asserted by the applicant without convicting this court of usurping a jurisdiction which it does not have. United States v. Swift & Co., 286 U.S. 106, cited by applicants with respect to the effect of a consent decree, relates to relinquishing of rights by private parties and not to surrender of powers by a statutory board, and that case is not apposite.

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[2] "However well adapted this order may have been to accomplish a common sense result, I do not see how power to issue it could exist." United States v. United States District Court, 206 F. 2d 303, (concurring opinion) p. 311.

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It seems plain therefore that this court is without jurisdiction to grant the relief here prayed for. The practical reason given by the applicant union for seeking our intervention here is its statement that in consequence of the Board's present designation of the larger unit which includes not only stewards department employees but deck and engine department employees as well, the stewards department employees who make up the membership of the applicant union will be outnumbered and that their expressed desire to choose ILWU as the bargaining agent will certainly be over-ridden by the large number of other employees who will naturally favor Seafarers International Union. The latter, it is said, has a long history of discrimination against negro seamen; that large numbers of the applicant union's members, who are employees of the stewards department, are negroes; that if SIU continues its traditional policies these men will be denied union membership and in consequence will lose opportunities for employment.

The Board asserts that it has received assurance from SIU that the latter will refrain from its past discriminatory practices. Wholly apart from whether or not such an expression of good intentions may be relied on, it seems to me that applicant is unduly alarmed and that its negro members will not be without protection under the law even if the rival union wins the election and attempts to repudiate its promise to reform in respect to racial discrimination.

The unit ultimately designated under §9(a) of the Act will be "the exclusive representative of all the

employees". In this respect the Act is like that dealt with in Steele v. N. & L. R. Co., 323 U.S. 192, where the court said: "The use of the word 'representative' as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent". Accordingly the court there granted effective relief against the attempted racial discrimination.

I think that the Labor Management Relations Act also furnishes adequate sanctions, not with respect to membership in the union,[3] but with respect to the right to employment which is the thing that is important here. If these negro seamen are denied employment in consequence of their inability to obtain membership in a union, "for reasons other than the failure of the employee to tender the periodic dues", the employer may be proceeded against for an unfair labor practice

[3] I think the last chapter on this question has not been written. When Shelley v. Kraemer, 334 U.S. 1 held that the Fourteenth Amendment prohibited state courts from enforcing restrictive covenants based on race or color, the Court in Hurd v. Hodge, 334 U.S. 24, declared such covenants equally unenforcible in the federal courts, refusing to presume "that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the state". The court pointed to the portion of the Civil Rights Act which gives all citizens the same right "as is enjoyed by white citizens" to hold property. The Civil Rights Act (42 U.S.C.A. 1981), also grants equal rights to the benefit "of all laws and proceedings for the security of persons". A union which practices racial discrimination as a practical matter carries its policy into its collective bargaining agreements. It is a nice question whether the Labor Board may recognize or enforce such an agreement any more than a federal court may lend its aid to a racial restrictive covenant. This may well be a limitation upon the proviso to section 8(b)(1)(A) of the Act.

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under §8(a)(3) and the union would be subject to a like charge under §8(b)(2). The applicant asserts that the constituent units of SIU have previously refused to dispatch for employment negro seamen and that negro employees may be excluded in the future because of a previously existing method of hiring whereby employers who are members of PMA have hired their employees exclusively from maritime union hiring halls. Applicant says that that procedure will exclude the negro employees.

If such procedure is adopted it will constitute an unfair labor practice under the rule of the many decisions in this and other courts which are collected in National Labor Relations Board v. F. H. McGraw & Co., 6 Cir., 206 F. 2d 635, 639. Cf. Radio Officers v. Labor Board, 347 U.S. 17, 47-48. Such an illegal hiring practice cannot be accomplished "through the device of requiring referral by the union or otherwise".

(Endorsed:) Opinion. Filed Jan. 22, 1955.
Paul P. O'Brien, Clerk.